

## **Legal Update—November 17, 2011**

### **Valley Agricultural Runoff Lawsuit**

#### *Pacific Coast Federation of Fisherman's Ass'n v. US Bureau of Reclamation*

A coalition of fishing and environmental groups filed a suit last week in US district court in the eastern district of California. The plaintiffs brought the suit against the US Bureau of Reclamation and the San Luis & Delta-Mendota Water Authority under the Clean Water Act alleging that the defendants were in continuous violation of the CWA by discharging agricultural runoff heavy in selenium and other contaminants into the San Joaquin River, its tributaries, and the Delta without a permit.

At issue is the Grassland Bypass Project which drains agricultural runoff from west San Joaquin County farmland through the Project's canals, including the San Luis Drain, to the flows of the Mud Slough, a tributary to the San Joaquin River, and out into the Delta. The Project was implemented in 1995 so as to drain the runoff by this route rather than directly to wetlands such as Kesterson National Wildlife Refuge where the impacts of contamination were being realized.

The plaintiffs assert that the CWA requires a permit for the discharge of any pollutants into navigable waters and that the runoff would prove detrimental to the fish species and ecosystem of the Delta as well as the quality of drinking water delivered from the Delta. The defendants have responded that the Project has been working and that the levels of pollutants being drained have decreased significantly. Despite missing the deadline to completely eliminate contamination by late 2009, the progress of the Project was recognized and the Bureau and the Authority renewed their agreement for the Project through December 2019. The agreement and extension for the Project was consented to by the State Water Resources Control Board which included it as part of its basin management plan in 2010. That renewal spurred the bringing of the suit.

### **Delta Wetlands Project Lawsuit**

#### *Central Delta Water Agency v. Semitropic Water Storage District*

Last month, the Central Delta Water Agency brought a challenge in San Joaquin County Superior Court to the EIR adopted by Semitropic in regards to the Delta Wetlands Project. At issue is the Delta Wetland's proposal to fill in two Delta islands (Bacon and Webb) to create reservoirs and turn two additional islands (Bouldin and Holland) into habitat islands. This isn't the first time the Project has been proposed, nor the first time it has been challenged by Central Delta. In 2004, an appellate decision set aside the permits issued by the State Water Resources Control Board after a successful challenge by Central Delta. *Central Delta Water Agency v. SWRCB* (2004) 124 Cal.App.4th 245. In an important decision, the court held that water permits must specify an actual use of and the amounts of water to be appropriated. Also, that CEQA requires that permits be evaluated and conditioned to mitigate environmental consequences based on the specific intended beneficial use.

This time around, Delta Wetlands partnered with Semitropic to produce the Place of Use EIR to remedy the past deficiencies. Central Delta alleges in its filings numerous deficiencies in this EIR including

insufficient consideration of effect on levees, the irreparable harm to the local economy and delta environment, and other procedural defects. Central Delta seeks a preliminary injunction to all actions related to the Project and to have Semitropic's resolution adopting the EIR vacated.

### **Corps Levee Policy Lawsuit**

#### *Friends of the River v. US Corps of Army Engineers*

The California Department of Fish and Game has joined environmental groups in federal litigation opposing the US Corps of Army Engineers' adoption of a national policy that requires removal of almost all trees and shrubs from levees. The DFG cites the irreparable damage the policy will cause to the fragile ecosystem along the Sacramento and San Joaquin Rivers and their tributaries which feed into the Delta. The case is being heard in the US district court in the eastern district of California.

### **Area of Origin**

#### *Tehama-Colusa Canal Authority v. US Department of Interior* [Federal]

In early August, Judge Wanger ruled that CVP contractors could not invoke area of origin priority in receiving their CVP-contracted water before other contractors. The ruling favored the Federal Bureau of Reclamation which manages the CVP, and dismissed TCCA's assertion that under CA state area of origin law that they should receive their entire allotment in dry years before CVP contractors in the south received any of theirs. Judge Wanger relied on three key aspects: First, the federal reclamation statutes that govern the CVP require utilization of water "for the widest public benefit." Second, that area of origin priority was an "inchoate right" only invoked after a water right is perfected consistent with state law. And third, the contract entered into by TCCA with the Bureau contains provisions for allocation during shortages and the TCCA's willingness to enter into the contract equitably estops it from claiming that the CVP's structure of allocations is illegal. TCCA has appealed to the 9<sup>th</sup> Circuit and opening briefs are due next month.

#### *Solano County Water Agency v. DWR* [State]

Case is pending in Sacramento Superior Court. This case is the state analog to *Tehama* with one of the main issues in litigation being whether a contractor with SWP may invoke area of origin priority. Despite an earlier appellate case (*Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 3<sup>rd</sup> district court of appeals) which rejected an argument nearly identical to that proffered by DWR in the current case, the court has held that a triable issue of fact exists.